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IN THE

Supreme Court of the United States

AND

In the Supreme Court of the State of California

No. L. A. 18808

THE GOSPEL ARMY, a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, THE BOARD OF SOCIAL SERVICE COMMISSIONERS, DEPARTMENT OF SOCIAL SERVICE, and DAN O. HOYE, City Controller,

Appellees.

REPLY TO APPELLEES' OPPOSITION TO APPEAL AND MOTION TO DISMISS OR AFFIRM.

ROBERT H. WALLIS,
328 American Avenue, Long Beach, Calif.
Attorney for Appellant.

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IN THE

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THE GOSPEL ARMY, a corporation,

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Appellees.

REPLY TO APPELLEES' OPPOSITION TO APPEAL AND MOTION TO DISMISS OR AFFIRM.

Appellant will reply as briefly as possible to the three grounds upon which appellees move to dismiss this appeal or affirm the judgment of the Supreme Court of California and opposing this appeal.

I.

Appellant's counsel is confident that the first ground is without foundation. Yet, as indicated by this court in *Department of Banking v. Pink*, 317 U. S. 264, 87 L. Ed. 254, the question presented by appellees is one as to

which the bar has been in need of judicial guidance and the cases have not always harmonized. (*Radio Sta. WOW v. Johnson*, 326 U. S. 120, ... L. Ed. .....) Hence, no concise reply would be convincing.

Appellees fail to point out the supposed applicability of the decisions cited in their opposition statement and motion to dismiss or affirm.

The point first made, that a state statute making a decision final is not determinative of finality in appeals to this court is irrelevant since appellant has not relied on such a California statute. *Cole v. Violetti*, 319 N. S. 581, cited by appellees to support the point is equally inapplicable, although it rests upon a settled rule.

However, appellees accompany the above point with a reference to California law as interpreted by a Federal decision as to the finality of judgments of reversal for purposes of appeal. That case is *Mutual Orange Distributors v. Agricultural Prorate Com.*, 30 Fed. Supp. 937.

The opinion, *as pure dicta*, states substantially as appellees say, that a reversal in California without direction to the lower court is not a final judgment, but it is added, *"with the exception that the opinion of the court on appeal must be followed so far as applicable."* (Emphasis added.)

It is settled law in California that where a judgment is reversed for further proceedings without specific directions, if further proceedings are had the decision on appeal becomes binding as to all matters of law determined in the opinion on appeal. (*English Olympic Auditorium, Inc.*, 10 Cal. App. (2d) 267; *McCandless v. Los Angeles*, 10 Cal. App. (2d) 407, 409.)

Later in this reply argument appellant will show that under the rule of Federal decisions an opinion accompanying an unqualified reversal judgment by California Appellate Courts is a part of the judgment.

Hence, in the instant case, when the Supreme Court held that the charities of a religious organization could be separated by the city ordinance from its religious activities and treated as a business without infringing the right of religious freedom, this was a final determination, and the same must be true if its approval, (as against the challenge of the Gospel Army that they violate said right and/or the due process clause of the Federal Constitution), of numerous provisions and sections of the city ordinance involved, such holdings were binding on the lower court in all subsequent proceedings, and the whole purpose of the action was to secure a final determination of these and similar questions of law.

In *Department of Banking v. Pink*, 317 U. S. 264, 87 L. Ed. 254, cited by appellees, it is said:

> "For the purpose of finality which is prerequisite to a review in this court, the test is not whether under local rules of practice the judgment is denominated final, (citing cases), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see Garman v. Washington University, 316 U. S. 98, 86 L. ed. 1300, 62 S. Ct. 962)."

Again, appellees have failed to elucidate the point or to reveal their idea as to why or how the judgment herein involved fails to comply with the test above set forth. It is believed that appellant's jurisdictional statement

shows conclusively that the instant judgment of the State Supreme Court fully adjudicated the Federal constitutional rights and questions involved and upheld the city ordinance involved as against all constitutional challenges.

Appellee's last case under the first ground is *Market Street Railway v. R. R. Com.*, 89 L. Ed. Adv. Op. 788, makes the test of appealable finality, that "the issues are adjudged and no other court has power to revise or modify it." Appellees fail to show in what respect the judgment involved herein is deficient under this test, and we will later show that it amply suffices.

Judgment of Reversal for Further Proceedings Below Are Not Final.

Ohlinger's valuable work on Federal Practice* states the above rule as "uniformly held".

However, an examination of the cases cited by Ohlinger and of many others listed in the Digests under Finality of Judgments reveals no decision which has gone beyond that rule and held that an unqualified "judgment reversed" decree lacks the finality essential to appealability.

The cases upon which Ohlinger's text relies and others of the same type, divide into three groups, as follows:

1. Reversal, remanding for *further proceedings below, not of ministerial character,* are not appealable.

   Hartford Acc. Co. v. Burm, 285 U. S. 169, 76 L. Ed. 685;

   Schlosser v. Hamphill, 198 U. S. 173, 49 L. Ed. 1000.

*Vol. 1, p. 826.

2. Judgment of reversal *with leave for further proceedings in the court below, not ministerial, held not final.*

Georgia Ry. Co. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065;

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73.

3. Essential finality held wanting in

Judgment of reversal ordering a new trial, in the court below, without further directions:

Brown v. Union Bank, 4 How. 465, 11 L. Ed. 1058;

Tracy v. Holcombe, 24 How. 626, 16 L. Ed. 742;

Baker v. White, 92 U. S. 176, 23 L. Ed. 480;

Spilles v. Atchison T. & S. F. Ry. Co., 253 U. S. 117, 64 L. Ed. 810;

Johnson v. Keith, 117 U. S. 198, 29 L. Ed. 888;

Hume v. Bowie, 148 U. S. 244, 37 L. Ed. 438.

The rule which makes the face of the judgment the sole criterion from which its finality or lack of finality is to be determined has been adhered to so frequently as to merit the designation "mechanical rule", yet careful research has failed to discover any instance of an appeal or writ of error being dismissed except where the judgment of the higher court directed something more than a ministerial act to be done in the lower court.

Hence appellant contends that the judgment herein involved, which merely reads, "Judgment reversed" is not controlled by any of the decisions construing judgments of the types above described.

On their face the words "Judgment reversed", neither require or authorize any further proceeding in the lower court.

To hold that this judgment does not terminate the proceeding requires an examination and consideration of matters extrinsic of the judgment—the opinion, California laws and decisions and the judgment which was reversed, and if these aids are invoked it will appear that the judgment is final.

Appellees' last named decisions adhere to one of the "mechanical rules" for determining finality, as it is termed in *Radio Station WOW v. Johnson*, 326 U. S. 120, ... L. Ed. .....

THE EFFECT OF THE JUDGMENT OF THE STATE SUPREME COURT MAKES IT FINAL AND APPEALABLE.

Appellant contends and expects to show that the judgment herein involved while near to that "penumbral area" recognized by this court and necessarily left undefined in the recent opinion in *Radio Station WOW v. Johnson, supra*, but that the class of judgment in which it belongs is in full accord with the long established general rules which confine consideration to determine appealable finality to the face of the judgment and require that it be a full determination of the merits of the case and be not subject to review by another court.

To elucidate this proposition fully and clearly necessitates greater elaboration than counsel would otherwise be warranted imposing on the court.

A Judgment or Decree of the Highest State Court Reversing the Judgment of a Lower Court With Directions to Proceed in Accordance With the Opinion Is a Final Appealable Judgment or Decree.

This was the form of the decree of the State Supreme Court in *Clark v. Willard*, 292 U. S. 112, 78 L. Ed. 1160. This court, with no dissents, held that the opinion became a part of the decree and that in the light of the opinion the portion of the decree from which the appeal was taken finally determined the rights of the parties which it concerned, and was, itself appealable.

Likewise it was held in *Metropolitan Water Co. v. Kaw Valley etc. Dist.*, 223 U. S. 519, 56 L. Ed. 533, 535, and *Gulf Ref. Co. v. United States*, 269 U. S. 125, 70 L. Ed. 195, 197, that a reversal remanding to the lower court for further proceedings *in conformity with the opinion* makes the opinion a part of the decree.

In each of these cases it was held that the Judgment in this form was appealable.

Of course, if the full decree, including the opinion does not provide finality, it is not appealable to this court, but appellant expects in that behalf to fully reconcile the instant judgment with the rule announced in *Department of Banking v. Pink, supra*, and other cases holding similarly.

Under the Law and Practice of the State of California Every Judgment Which Unqualifiedly Reverses the Decree of the Lower Court Automatically Remands the Case and Requires That Further Proceedings Below Be Governed by the Opinion of the Higher Court.

In California the identical provision contained in the decrees in *Clark v. Willard*,[1] *Metropolitan Water Co. v. Kaw Valley Dist.*; and *Gulf Ref. Co. v. United States* is added by legal implication to the each decree which reads "judgment reversed" and it must be presumed that courts rendering judgments in this form know that this is the law.

It Is Settled Law in California That Where a Judgment of the Supreme Court Reads "Judgment Reversed" and States in an Opinion Principles and Rules Necessary to Its Decision, Throughout All Subsequent Proceedings in the Court Below the Opinion Is Binding and Must Be Given Effect.

This rule is declared in the following, among many other cases:

Westerfield v. New York L. Ins. Co., 157 Cal. 339;

Estate of Baird, 198 Cal. 490;

Estate of Baird, 193 Cal. 225;

Central Sav. Bk. of Oakland v. Lake, 201 Cal. 438, 443;

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[1]The weight to be accorded this decision as a precedent is not weakened by such cases as *Union Mutual L. Ins. Co. v. Kirchoff*, 160 U. S. 374, 40 L. Ed. 461, and others therein cited, in which *the opinoin was not contained in the record.*

Anselmo v. Sebastiani, 219 Cal. 292;
Tally v. Ganahl, 111 Cal. 418;
Brett v. Frank & Co., 162 Cal. 336.

Unless the Evidence Is Substantially Different on a Second Trial the Foregoing Rule Applied to All Rulings Pertaining to the Evidence and Motions Relative Thereto.

Aurenty v. Los Angeles Ry. Corp., 35 Cal. App. (2d) 615, 621;

Bean v. Duggan, 37 Cal. App. (2d) 491;

Sisco v. City of Los Angeles, 37 Cal. App. (2d) 6;

Estate of Baird, 198 Cal. 490.

Hence, when the State Supreme Court rendered its judgment herein involved it must be presumed to have known and intended that its opinion would be binding on the lower court and that it must proceed, if at all, in accordance with the opinion, which became a part of the decree for that purpose.

The Opinion Herein of the California Supreme Court Finally Determined the Rights of the Parties Concerned and Terminates the Litigation on Its Merits so That if an Affirmance Should Be Decreed by This Court the Court Below Would Need Only to Execute Its Decree.

The State Supreme Court opinion first states that the suit is to enjoin the enforcement of the city ordinance involved "on the ground they abridged its religious liberty in violation of the constitution of the United States"; and that the trial court found that plaintiff "engaged exclusively in the promulgation, by literature

and word of mouth, of its religious beliefs, by and through its auxiliaries, and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities," and that the trial court "enjoined defendants from further interference and threatened acts which would in any way prevent the free exercise of the religious liberty and freedom of worship of said plaintiff'." (Jur. Stat. Append. p. 1.)

The opinion then recites in detail the activities of the plaintiff, including the maintenance of a store where second-hand donated goods are sold, conducted by a solicitor. (Jur. Stat. Append. pp. 2-7.)

It then sets forth the substance of the sections of the ordinance. (Jur. Stat. Append. pp. 7-15.)

It considers first the provisions concerning the store and decides that it is not a religious activity, although the trial court found that its proceeds were used for its religious activities, and the opinion holds that the foregoing provisions are reasonable and the standards are adequate. (Jur. Stat. Append. pp. 7, 8.)

The opinion next takes up the remaining sections, (44.01 to 44.19), which regulate charities. It meets plaintiff's constitutional challenges of the provisions of the ordinance by first deciding that the charitable activities of a religious body may be served by law from its religious activities so that such charitable activities may be regulated as a business, and that this is done by the ordinance involved. (Jur. Stat. Append. pp. 16-23, and pp. 28, 29.)

It decides that these sections, considered as a whole and separately, are not "unduly burdensome or unrea-

sonable (Jur. Stat. Append. pp. 7, 8) and that their requirements may be enforced "without abridging its (plaintiff's) religious liberty in violation of the Constitution of the United States." (Jur. Stat. Append. pp. 16, 23.)

The opinion holds that certain sections challenged by appellant as violative of the 14th Amendment as fixing no standard for official action and for other constitutional reasons, are "neither vague nor uncertain and affords no possibility for censorship of religious beliefs." (Jur. Stat. Append. p. 28.)

It holds that certain sections challenged by the Gospel Army as discriminatory, arbitrary and oppressive do not "discriminate against plaintiff or other religious organizations or censor their religious beliefs." (Jur. Stat. Append. pp. 26, 28.)

It holds that certain sections challenged by the Gospel Army as violative of the 14th Amendment as arbitrary and unreasonable classifications and discriminatory against religious organizations are "reasonable and the standards provided are adequate." (Jur. Stat. Append. p. 2.)

Broadly, the opinion shows that the ordinance involved, as a whole, and each of its sections had been challenged as in violation of the 14th Amendment to the Federal Constitution upon one or more grounds; that the opinion upholds their validity in every instance; that no other questions are considered, and the only issues regarded or decided are the foregoing; also, that evidence in the lower court as to the Gospel Army's activities was undisputed and the findings were not challenged. (Jur. Stat. Append. pp. 1 to 29.)

Hence, it cannot be doubted that the instant State Supreme Court opinion and judgment, being binding on

the lower court, in effect directs the dismissal of the action or entry of judgment for the defendants, thus rendering to the higher court's decree the essential finality, unless the order of dismissal is appealable.

Hartford Acc. Co. v. Bunn, 285 U. S. 169, 76 L. Ed. 685;

Mower v. Fletcher, 114 U. S. 127.

A judgment of a lower court entered as directed by a higher appelate court is not appealable.

Heinlen v. Beans, 73 Cal. 240;[2]

Phillips v. Patterson, 34 Cal. App. (2d) 481, 487;

Heinlen v. Martin, 59 Cal. 181;

Keller v. Lewis, 56 Cal. 466;

Argenti v. Sawyer, 32 Cal. 414.

Where a Judgment of a Trial Court Is Reversed and Remanded if the Effect of the Opinion of the Higher Court Is to Direct That a Particular Judgment Be Entered Below, No Re-Trial Can Be Had and a Different Judgment Than That Directed Is Without Jurisdiction and Void.

Snoffer v. City of Los Angeles, 14 Cal. App. (2d) 650;

English v. Olympic Aud. Inc., 10 Cal. App. (2d) 196, 201;

Lial v. Superior Court, 133 Cal. App. 31;

Heinlen v. Martin, 59 Cal. 181;

Keller v. Lewis, 56 Cal. 466.

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[2]To the same effect, see: *Leerly v. McEwen*, 208 Cal. 645; *Security Inv. Co. v. Bieg-Hoffine Co.*, 28 Cal. App. (2d) 698; *Phillips v. Patterson*, 34 Cal. App. (2d) 481; *Texas Co. v. Moynier*, 137 Cal. App. 112; *Lial v. Superior Court*, 133 Cal. App. 31.

WELL ESTABLISHED LIBERALIZING RULES GIVE APPEALABLE FINALITY TO THE JUDGMENT HEREIN INVOLVED.

Appellant will concisely point out that certain respected decisions, nearly all of which are relied upon or referred to with approval in the recent *Radio Station WOW v. Johnson* opinion (326 U. S. 120), have established rules which give to the words "final decrees" as used in applicable acts of Congress "a more liberal" and "reasonable construction" and "one more consonant with the intention of the Legislature"[3] than the "Mechanical Rule[4]" for appealable finality, and appellant will then show that the instant State Supreme Court judgment fully qualifies as final under such rules.

The cases to be relied upon generally divide into two groups. They set up standards which qualify and liberalize strict rules regarding appealable finality, from which it results that the following judgments have such finality:

1. Where a judgment directs the immediate delivery of the property involved causing great or irreparable injury and asserted Federal rights are disposed of.[5]

2. A judgment which accomplishes "the whole purpose of the suit," as shown by the pleadings.[6]

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[3]In the *Forgary v. Conrad* opinion the above quoted language was used in describing the rule announced therein, and in cases cited.

[4]In the *W. O. W.* decision Justice Frankfurter applies this term to the commonly used test of appealable finality which requires that.

3. This court regards "serious public consequences" if involved in a judgment, not technically final, but where Federal questions appealable here have been adjudged by the State court as a substantial contributing factor to justify departure from the strict rule.[7]

Liberalizing Ground 1.

(For brevity, reference is made to it as stated above.)

It was held in the *Radio Station WOW* decision that although an accounting remained to be taken, since no Federal question could arise in that matter and the State Supreme Court's judgment had adjudicated the Federal questions involved and had directed immediate delivery of physical property resulting in the possible termination of the radio station public deprivation, the decree was final for purpose of review by this court. It is said that "The case comes squarely within Forgay v. Conrad, *supra*, and Carondelet, *supra*."

In the *Forgay v. Conrad* case this court held that the part of the decree of the lower court which directed immediate delivery of property involved was final, although not so "in the strict, technical sense of that term," and that other portions were not final. The appeal was from the first mentioned portion and a motion to dismiss was denied.

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[5]*Clark v. Willard; Forgay v. Conrad; Carondelet C. & U. Co. v. Louisiana; Radio Sta. W. O. W. v. Johnson*, all *supra*.

[6]*Carondelet Canal & U. Co. v. Louisiana; Winthrop Iron Co. v. Meeker; Craighead v. United States v. Rogue River Imp. Co.*

[7]See *Radio Sta. W. O. W. v. Johnson*. That element was present also in the *Carondelet* and *Forgay*, and *Gulf Refining Company* cases.

The considerations which moved this court to reach this conclusion were that although "according to the last provision of the decree, the bill was retained merely for the purpose of adjusting the accountings[8] referred to the master." The other matters brought into the controversy were finally disposed of and it is said, "if these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury."

In *Clark v. Willard*, 292 U. S. 112, 78 L. Ed. 1160, it was held that the judgment of the State Supreme Court had the requisite finality, although it continued the receivership and other proceedings incident thereto, and further judicial proceeding would be necessary, because the decree confirmed a creditor's levy and execution and would "override" the liquidator's title to property levied upon, and would thus irretrievably deny to the liquidator the benefit of the full faith and credit provision of the Federal Constitution and had finally fixed the rights of the parties.

The *Clark v. Willard* opinion cites *United States v. Rogue River Imp. Co.*, 269 U. S. 411, 70 L. Ed. 339, and *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404.

In *Carondelet Canal & N. Co. v. Louisiana*, 233 U. S. 362, in denying a motion to dismiss the opinion not only asserts that the State Supreme Court's decree was final in directing the immediate deliv-

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[8]Under the technical mechanical rule it has often been held that this provision of a decree robs it of appealable finality. See *California Nat'l Bk. v. Stateler*, 171 U. S. 447; *McCorkey v. Toledo & Ohio R. Co.* and cases cited.

ery of property involved, but it also stresses that the "Federal rights asserted by the canal company were injuriously disposed of by the decree, and that the decree "has substantial finality" in that "all was decreed which it was the purpose of the suit to have decreed," to-wit, "the Federal right asserted by the canal company."

The instant judgment has the requisite finality under liberalizing rule 1 because its effect is to immediately dispose of and take away appellant's asserted right of religious freedom and certain property rights (store and donations) in violation of the 14th Amendment.

The judgment of the lower court which it reversed reads:

> "It is ordered, adjudged and decreed: That the defendants and each of them * * * are hereby restrained and enjoined from the further interference and threatened acts, which would in any way prevent the free exercise of the religious liberty and freedom of worship of the said plaintiff."[9] (Jur. Stat. Append. p. 1.)

The trial court found, (and the finding was not challenged), that "unless the said defendants are enjoined and restrained from doing the things heretofore mentioned" (enforcing the provisions of the city ordinances against plaintiff) "the rights of plaintiff to worship and carry on said religious activities * * * will be infringed and said plaintiff will suffer irreparable damage." [Clk. Tr. pp. 32-34.]

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[9]It will be shown in discussing Liberalizing Rule 2 that the findings and pleadings render the judgment definite and certain.

The legal effect of the reversal of the judgment below instantly wiped it out[10] and left the defendants free to immediately close appellant's store where donated goods were sold and to arrest its solicitors, its promoter-solicitor and its officers unless license fees were paid, bonds executed and filed, and all other provisions complied with, all of which the trial court found would result in "irreparable injury" to the plaintiffs.

On principal the effect of this judgment is just as immediate and as destructive of constitutional rights which are at least as substantial as any involved in the decisions[11] which declare the rule now being discussed.

Rule 2 Above. A Judgment of a Court of Last Resort Which Accomplishes "The Whole Purpose" of the Action, as Shown by the Pleadings Has Appealable Finality.

The *Carondelet Canal & N. Co. v. Louisiana* opinion has been quoted to this effect. (*United States v. Rogue River Imp. Co.*, 269 U. S. 411, 70 L. Ed. 339, upholds this rule.

In the *Winthrop v. Meeker* case this court announced broadly that a decree is final for the purposes of appeals to this court, where "The whole purpose of the suit has been accomplished."[12]

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[10] *Reynolds v. Hosmer*, 45 Cal. 616; *Estate of Mitchell*, 126 Cal. 248.

[11] Full faith and credit and property rights.

[12] The principle and doctrinaire of this decision is amply warranted by the opinions upon which it relies.—*Craighead v. Wilson*, 18 How. 202, 15 L. Ed. 332, and *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404.

It was determined that "the decree is final on all matters within the pleadings, and nothing remains to be done but to adjust the accounts between the parties growing out of the operations of the defendants during the pendency of the suit,"—although a receivership was continued to carry on the business of the corporation involved.

In the *Craighead*[13] *v. Wilson,* 18 How. 202, 15 L. Ed. 332, this court reviewed earlier applicable decisions and said:

> "To authorize an appeal, the decree must be final in all matters *within the pleadings,* so that an affirmance of the decree will end the suit. To apply this test, in all cases, cannot be difficult." (Emphasis added.)

The instant judgment accomplishes the whole purpose of the suit as shown by the pleadings. It is shown in the jurisdictional statement herein[14] that the complaint seeks injunctive relief against the enforcement by defendants, through criminal prosecutions and other acts of the City ordinance involved and of each of its essential provisions on Federal Constitutional grounds alone; that the defendants answered and asserted their right to enforce every section and provision of said ordinance and based their defense solely upon the affirmation, set forth in that pleading, that no section or provision of said ordinance infringes the constitutional rights of the plaintiff as claimed in the com-

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[13]Certain decisions have expressed veiled disapproval of the *Forgay v. Conrad* decision. However, any doubt arising therefrom concerning its standing is removed by the recent opinion in *Radio Station W. O. W. v. Johnson, supra,* and this, perforce, gives added weight to the *Craighead* decision which is relied upon in the *Forgay v. Conrad* opinion.

[14]Jur. Stat. pp. 25, 26.

plaint. There was no other defense pleaded and no other issue presented (Jur. Stat. pp. 26-32).

The sole purpose of the action was to secure judicial protection of appellant's asserted constitutional rights, and a judicial determination concerning them. The trial court provided the remedy sought and the Supreme Court in reversing the lower court's judgment wiped the remedy out and decided that no constitutional right of the plaintiff was infringed by any provision of the City ordinance involved or the enforcement thereof by defendants against plaintiff.

Hence, appellant contends that the instant judgment of reversal has appealable finality.

II.

Appellee's attack upon the judgment of the trial court as vague and indefinite is irrelevant to the issues presented in this proceeding in opposition to the appeal.

This necessarily results from the doctrine of the decisions of this court which have been discussed above.

The appeal is not taken from the judgment of the lower court, although its findings of fact which were not challenged in the higher court may be important. Appellees have not claimed and could not plausibly contend that the judgment of the State Supreme Court is vague or indefinite.

Appellees rely upon *Ellis v. Nademacher*, 125 Cal. 556, but essential differences exist between the conditions in that case and those in the instant proceeding.

It is well settled in California, as elsewhere, that a judgment, even though uncertain and indefinite on its face, may be rendered certain and definite when construed in connection with other parts of the judgment roll.

This rule was recognized and applied in *Byers v. Colonial Irrigation Company*, 134 Cal. 553, cited by appellees. In that case the Supreme Court consulted the findings and ordered the decree amended to conform to them.

In the following cases the pleadings were examined and the judgment was construed in their light:

Pomona L. & W. Co. v. San Antonio W. Co., 152 Cal. 618;

Freeman v. Donohue, 188 Cal. 170;

Atlantic Gulf & P. Co. v. Wright, 11 Cal. App. 179;

Gray v. Cohen, 3 Cal. App. 75.

The findings supplied clarification of the judgment or limited it in these cases:

Ramacciotti v. Ramacciotti, 131 Cal. App. 191;

Roger v. Struven, 44 Cal. App. 528;

Pac. Paving Co. v. Vizelich, 1 Cal. App. 281.

In the *Nademacher* case the judgment was by default and the opinion says, "It is well settled that a judgment by default cannot give any relief in excess of that demanded in the complaint."

The other cases cited by appellee are not in point. They are *Gregory v. Blanchard*, 98 Cal. 311 and *Byers v. Col. Irr. Co.*, 134 Cal. 553.

In each case the *plaintiff* appealed and it was held that the decree in his favor was too general and vague *to give him the relief to which the allegations of the complaint entitled him.*

In the instant case the pleadings and the findings leave no room for doubt as to the acts and things referred to and enjoined by the judgment.

The amended complaint alleges specifically that the defendants required the Gospel Army to "apply for and receive" a "permit" authorizing it to continue its "religious activities" before continuing the same and "has demanded" of plaintiff that it pay to said city a "license to operate the store" and the "disposal" of personal property "donated and given to plaintiff by the general public, the proceeds therefrom being used by the plaintiff in the furtherance of said religious organization" and that defendant "have and threatening" criminal prosecution of plaintiff if it fails to comply with such requirements and others which are described. (Jur. Stat. pp. 25, 26.)

Defendant's answer avers that defendant's claim that plaintiff must secure "a permit" "from the Board of Police Commissioners" and in not doing so is "subject to criminal prosecution" and defendants "contend that under Section 24.01 . . . of the said Municipal Code a permit must be secured" from said Board for the operation of said store, and also, that defendants allege that plaintiff must first "apply for and receive" a "permit" authorizing plaintiff to "continue its activities in the City of Los Angeles."

Said answer avers that the plaintiff is subject to the "rules and regulations and laws" of the "defendant city of Los Angeles pertaining to charities and relief", and specifies many of the sections of the ordinance involved, among which are those pertaining to solicitors and promoters of money or property (44.01 to 44.19), and the entire regulations of such solicitations (Jur. Stat. pp. 26, 27), and the "activities" of plaintiff in said city are shown by the amended complaint to include soli-ita-

tions for money and goods whose proceeds are used in furtherance of its religious activities, among which are its charities. (Jur. Stat. pp. 25, 26.)

The answer directly places in issue the character of plaintiff's activities as religious or charitable and avers that the ordinance involved empowers the said Board and its officers and employees to make all of the exactions and exercise all of the powers provided for in said ordinance (Jur. Stat. pp. 29, 30), which powers as applied to plaintiff as shown by defendants' answer are the right to require plaintiff's solicitor or "promoter" who sells plaintiff's donated goods to secure a "license" and pay a license fee and provide a $2,000 bond; the right to require plaintiff's solicitors for donations of money and goods apply for permit and to refuse the same if any donations are used for charity; and the right to compel the Gospel Army and its promoter and solicitors to comply with all of the provisions of said ordinance pertaining to solicitations, supplying data and accounts to the Board, authorizations from it and the maintenance by it as detailed a bookkeeping system. (Jur. Stat. Append. pp. 7-10.)

In short, by its answer the defendants asked for a decision by the trial court as to the applicability of the entire city ordinance to the activities of the Gospel Army.

Hence the decision which appellees contend is indefinite when clarified by the pleadings enjoins defendants from applying said ordinance or any provision thereof to the Gospel Army or to any of its activities. This accords with the findings and they in turn clarify the judgment; these findings are quoted in the Jurisdictional Statement, pages 29 to 31, as follows:

> "It is true that the said Defendants have notified the Plaintiff that it is subject to the rules, regulations

and laws of the said Defendants pertaining to charities and relief and that the said Plaintiff organization is subject to the enforcement of said rules and regulations by the Board of Social Service Commissioners and the Department of Social Service, and that before said Plaintiff organization can continue their religious activities in the City of Los Angeles they must first apply for and receive from the said Board of Social Service Commissioners and Department of Social Service a permit authorizing said Plaintiff organization to continue their religious activities in said City of Los Angeles, the said Board of Social Service Commissioners and Department of Social Service having full power, under the ordinances of said City of Los Angeles, to pass on and reject all applications coming before them; that the Defendant, Dan O. Hoye, the City Controller, of the City of Los Angeles, has notified and demanded of the Plaintiff that it must pay to the City of Los Angeles, through his office, a license to operate the store of Plaintiff, which store is being conducted by Plaintiff for the sale and disposal of salvaged personal property donated and given to the said Plaintiff by the general public, the proceeds derived therefrom is used by the Plaintiff in the furtherance of said religious organization, and that said Dan O. Hoye and all of the other defendants contend and state that the Plaintiff is violating the ordinances of the City of Los Angeles pertaining thereto and is subject to criminal prosecution, and the said defendants have and are threatening criminal prosecution of this Plaintiff.

"It is true that if this Plaintiff is required to obtain a permit and the payment of the license as a condition of their soliciting and receiving donations as aforesaid, to be used in the furtherance of said religious activities, will amount to a prior restraint on the ex-

ercise of their religious activities within the meaning of the Constitution of the United States, both as to the First and Fourteenth Amendment thereof, and is an infringement upon the free exercise of their religious liberty as protected by the said constitution.

"It is true that unless the said Defendants are enjoined and restrained from doing the things hereinbefore mentioned the rights of the Plaintiff to worship and carry on said religious activities their right to the free exercise of their religious liberty will be infringed and said Plaintiff will suffer irreparable injury therefrom." [Clk. Tr. pp. 32-34.]

That opinion properly and necessarily treats the issues presented as did the trial court and decides them on the Constitutional grounds shown in the Jurisdictional Statement, in the end holding that said ordinance and all of its provisions valid and not violative of appellant's right to freedom of religion or the exercise thereof of its rights guaranteed by the due process clause of the Constitution of the United States.

A further answer rebutting appellees' contention concerning the alleged vague nature of the trial court judgment, is that the Supreme Court did not once mention appellees' argument on that question, but did exhaustively consider and fully decide each of the several Federal questions presented.

Hence jurisdiction herein will be upheld.

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 82 L. Ed. 685;

International Steel Co. v. Surety Co., 297 U. S. 657, 80 L. Ed. 961.

The foregoing renders irrelevant appellees' contention and cases cited to sustain the proposition that unless the decision of the Federal question was necessary, an appeal will be dismissed.

However, said decision, to-wit, *Honeyman v. Hanan*, 300 U. S. 14, 81 L. Ed. 476 and *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U. S. 206, 82 L. Ed. 751 are otherwise inapplicable herein.

In the first case, aside from a certificate by the State Supreme Court in its remittitur there was nothing to show that a Federal question was presented. It was merely held by in this court that the function of such certificate is to clarify the record if it needs clarification, but that the certificate is not controlling and the Supreme Court will decide for itself from the record whether these essentials are shown.

In the instant case the Jurisdictional Statement suffices, without the aid of the certificate to show that Federal questions were properly raised and were necessarily determined by the State Supreme Court.

In the *Bell Telephone* case this court indicated that from the record presented it cannot be determined whether the State Supreme Court made its decision on a Federal or non-federal ground.

Hence the general rule as stated in that case was unnecessary to the decision thereof.

However, the rule has no application in this case because the jurisdictional statement clearly shows that the California Supreme Court decided a half dozen Federal questions and appellees fail to point out or to claim that a non-federal question was considered or decided.

III.

Appellees' third ground is entitled "No Substantial Federal Question Is Involved." However, it is not contended that the questions decided by the Supreme Court of the State of California and by the lower state court are not substantial Federal questions.

Instead, reliance is placed on a quotation from *Spense v. Cole*, 137 F. (2d) 71, to the effect that even though a Federal question is presented a *Federal Court will not enjoin a prosecution in a state court for violations of state laws* unless it is shown that irreparable injury would probably result.

This rule is announced and followed in *Douglas v. Jeannette*, 319 U. S. 157, 87 L. Ed. 1324, wherein it is said:

> "Hence the arrest by the Federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a Federal court of equity, are to be supported only on a showing of irreparable injury, both great and immediate."

Again it is said, reference being to the District Court:

> "But the trial court made no finding of threatened irreparable injury to petitioner or others, and we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case."

It is further said that in view of the *Murdock* decision[15] it would not be assumed that other prosecutions under the ordinance involved would be instituted.

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[15] *Murdock v. City of Jeannette*, 87 L. Ed. 1324, had just been decided and held that the same ordinance was unconstitutional and void.

The decisions in the *Spense v. Cole* and *Douglas v. Jeannette* cases have no application herein because:

1. As has been herein shown in the instant case the trial court found that "Plaintiff will suffer irreparable injury" "unless the defendants are enjoined and restrained from doing the things hereinbefore mentioned,"
2. The rule announced in said Federal decisions is restricted to Federal District Courts and cases in which such courts would restrain criminal prosecutions *in state courts under state laws.*

The "Mechanical Rules" Which Restrict to the Face of the Judgment the Scope of Consideration to Determine Appealable Finality and Require That the Decision Appealed Must Have Decided All Issues of the Case on the Merits Are Merely Rules of Convenience.

This proposition is recognized in *Radio Station WOW v. Johnson,* 326 U. S. 120, ... L. Ed. ....., and has been asserted in other cases among which are *Hazeltine v. Central Nat'l Bank,* 183 U. S. 133, 46 L. Ed. 118; *Hartford Acct. Co. v. Bunn,* 285 U. S. 169, 76 L. Ed. 785 and *Norfolk & S. Turnp. Co. v. Virginia,* 225 U. S. 264, 56 L. Ed. 1082.

The *Hazeltine* decision said that a judgment of the highest state court reversing that of a lower court and remanding the case for further proceedings frequently has been held not to be a final judgment because examination into the record to determine whether such a judgment, in a particular, is final, "would lead to inquiries, with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer," this Court has "made the face of judgment the test of its finality."

Both of the other decisions quote the above statement, with approval and the Norfolk opinion adds that the rule which makes "the face of the judgment" the only "criterion resorted to" is the "only means of obviating the risk of confusion" which might arise if other parts of the record were resorted to, and that the distinction made is "not one of principle."

It is implicit in the opinion in the *Radio Station W. O. W.* opinion that the rule which interprets the term "final judgment" so as "to preclude reviewability here where anything further remains to be determined by a state court, no matter how disassociated from the only Federal issue that has finally been adjudicated by the highest court of the state," is not based upon or sustained on principle or jurisdictional grounds but like the other rule has been "an important factor in the smooth working of our federal system."

Hence the rule that a judgment which reads "judgment reversed, cause remanded for further proceedings" or similar words, is not final, is one of court convenience.

Of course Court-made rules of convenience cannot be jurisdictional. The same authority which makes them, has the power, in proper cases and in the interest of justice, to make reasonable deviations. The Court's action is necessarily discretionary. Although some of the decisions refer to the matter as jurisdictional the foregoing cases and those principally relied upon in the late decision in *Radio Station W. O. W. v. Johnson,* refute that concept. That decision shows that deviations have been made from time to time, and it is said that "even so circumscribed a legal concept as appealable finality has a penumbral area."

It is worthy of consideration that since this court regards the Constitutional right of freedom of religion as so vital to the basic integrity of our form of government that no City ordinance may place prior restraints thereon which would in practice preclude an itinerant minister[16] from pursuing his calling and exercising that right, it would not be consonant with this concept to permit a rule of convenience set up to avoid situations which might be most difficult to solve, becoming prior restraint upon the protection of so sacred a right.

Obviously, a rule which would compel an itinerant minister or a tiny religious organization, such as the State Court's opinion herein shows the Gospel Army to be to pursue two and possibly more appeals to have his or its right again recognized, must, in effect, amount to a total denial of any remedy for the violation of the right—the continuance of which violation the high court's decree has made immediately effective.

For the foregoing reasons appellant prays that this appeal be docketed and appellees' motions be denied.

Respectfully submitted,

ROBERT H. WALLIS,
Attorney for Appellant.

[16] *Cantwell v. Connecticut.*